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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,
v.
JESUS MORALES, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the right to loiter on public streets with members of a criminal street gang is one of the traditional "amenities of American life" that, under principles of "substantive due process," may not be abridged by a police order to disperse.

2. Whether an ordinance that (i) specifically defines "loitering" and "criminal street gangs," (ii) authorizes police to order the dispersal of a group of loiterers when there is probable cause to believe that members of criminal street gangs are among the group, and (iii) permits the arrest of those loiterers who disobey the order to disperse, is so lacking in clarity that it is void for vagueness in all of its applications.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issues presented in this case: (1) the extent to which courts can invoke "substantive due process" to place particular classes of conduct beyond the reach of the criminal laws, and (2) the standards the courts must

apply in assessing whether criminal laws are "vague" or "overbroad." Those issues arise in this case in the context of a facial challenge to the ability of state and local governments to enact legislation outlawing loitering on public streets, where, as here, such loitering substantially furthers the nefarious activities of criminal street gangs. *Amici* believe that properly drawn loitering laws are an essential law enforcement tool that significantly contributes to reduce criminal activity and to improve the quality of life enjoyed by law-abiding citizens, particularly in urban environments. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. Recent years have seen a dramatic change in the way many big-city police departments respond to criminal behavior. Rather than focusing solely on solving serious crimes that already have occurred, police increasingly take measures to prevent crime before it happens. Police intervention in relatively small-scale disorder—for example, preventing rowdy, drunken and antisocial behavior; eradicating graffiti, litter and vandalism; and enforcing curfew, cruising and loitering laws—has been shown to make neighborhoods safer places and to reduce the incidence of more serious criminal activity. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 367-69 (1997) (recounting the experience of New York City, where more active enforcement of quality-of-life offenses, such as vandalism, panhandling and prostitution, contributed to a steep decline in the rates of murder, robbery and other serious crimes).

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The increasingly prevalent strategy of using police to maintain order in urban communities, in addition to the traditional police role of solving serious crimes, generally is referred to as "community policing." *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 573-78 (1997). A principal impetus for the community policing movement is the common-sense notion that there is less crime in orderly neighborhoods. As a leading article explained, "if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing." James Q. Wilson & George L. Kelling, *Broken Windows*, The Atlantic Monthly, Mar. 1982 at 29, 31 (emphasis omitted). Signs of disorder in public streets—*e.g.*, broken windows, litter, drunks or drug addicts slumped on the sidewalk, or loitering gang members—cause the law-abiding public to avoid public rights of way and thus severely dilute the kinds of informal social checks that traditionally have permitted all of us to look after each other and to keep our streets safer. "[I]t is more likely that here, rather than in places where people are confident they can regulate public behavior by informal controls, drugs will change hands, prostitutes will solicit, and cars will be stripped." *Id.* at 32.

2. In 1992, the Chicago City Council held extensive hearings on the vexing public-safety problems posed for that city's residents by criminal street gangs. After extensive testimony from law enforcement officers and from community residents who lived under the terror created by those gangs, the City Council found that "the continuing increase in criminal street gang activity in the City [was] largely responsible" for an "increasing murder rate as well as an increase in violent and drug related crimes," and that "the burgeoning presence of street gang mem-

bers in public places has intimidated many law abiding citizens." Pet. App. 60a.

The City Council specifically found that, apart from "creat[ing] a justifiable fear for the safety of persons and property in the area" (Pet. App. 60a), loitering involving members of criminal street gangs furthered the gangs' criminal activities in two important and distinct ways. First, gang members "avoid arrest" for their street crimes by eschewing overt criminality and simply loitering "when they know the police are present." *Ibid.* Second, loitering is indispensable to the notion of gang "turf"—*i.e.*, the assertion by a particular criminal gang of the right to *control* a given area of the City to the detriment of competing gangs and the members of the law-abiding public—because "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas." *Ibid.*

In view of those findings, the City Council adopted an ordinance authorizing police officers to order gang members who are loitering in public areas (or those loitering with them) to disperse, and to arrest those who refuse to do so:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. The ordinance carefully defined each of its operative terms. The phrase "criminal street gang" was defined to require, among other things, an association-in-fact or organization engaged in a pattern of specifically identified state crimes, *id.* at 61a-62a, thus tracking the definitions of "enterprise" and "racketeering" widely used in federal and state statutes that address the problems posed by organized crime. *See* 18 U.S.C. § 1961; *United States v. Turkette*, 452 U.S. 576 (1981). The term "loiter" was defined as "remain[ing] in any one place with no apparent purpose." Pet. App. 61a. The ordinance further provided that criminal liability may *not* be imposed if the defendant establishes, as an affirmative defense, "that no person who was observed loitering was in fact a member of a criminal street gang." *Ibid.*

In addition, the Chicago Police Department adopted detailed guidelines governing the enforcement of the gang-loitering ordinance. The ordinance was to be enforced only in "areas frequented by members of criminal street gangs which, because of their location, significantly affect the activities of law-abiding persons in the surrounding community." Pet. App. 68a. The guidelines require "probable cause" to believe that a particular individual is a member of a criminal street gang, and provide detailed objective criteria for assessing the existence of probable cause. *Id.* at 67a-68a, 71a-72a. Those criteria include the gang members' admissions, distinctive gang "colors" or tattoos, and statements by informants of proven reliability. *Ibid.*

3. Respondents were separately arrested for disobeying a police order to disperse or "move along" under Chicago's gang-loitering ordinance and challenged the validity of the ordinance on numerous constitutional grounds. After separate proceedings in the lower state courts, the Supreme Court of Illinois consolidated respondents' challenges and agreed with respondents that the ordinance violates the federal Constitution.

The court first concluded that the ordinance is void for vagueness. Pet. App. 6a-17a. The court explained that, even though the term "loiter" is specifically defined by the ordinance as "remain[ing] in one place with no apparent purpose," the term fails to give persons of ordinary intelligence sufficient notice of what is pro-

hibited because "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." *Id.* at 10a. That infirmity was not cured, in the court's view, by the requirement that the officer have probable cause to believe that one of the loiterers is a gang member, by the fact that it is a legal defense under the ordinance that no member of the group was in fact a gang member, or by the fact that prosecution is possible only if the defendant disobeys a clear order to disperse. As the court saw it, the City may not criminalize even a defendant's *knowing* participation in, or association with, criminal street gangs (*id.* at 12a), and it may not confer on police the authority to disperse loiterers "if the underlying statute is itself impermissibly vague." *Id.* at 13a.

The court also concluded that the purported "vagueness" of the ordinance improperly encouraged "arbitrary and discriminatory enforcement." Pet. App. 14a. In this connection, the court was especially critical of the Chicago Police Department's effort to set forth specific written guidelines for enforcing the ordinance, a step that the court conceded was contemplated by the City Council, because in the court's view "lawmakers may not abdicate their responsibilities for setting the standards of the criminal law." *Id.* at 15a.

Finally, the court held that Chicago's ordinance "is an arbitrary exercise of the city's police power and, thus, violates substantive due process." Pet. App. 17a. The court believed that its conclusion was compelled by *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), which, in the court's view, stood for the proposition that the type of loitering prohibited by the ordinance is one of the traditional "amenities of American life." Pet. App. 17a (citing *Papachristou*, 405 U.S. at 164). The "amenities" invaded by the Chicago ordinance, in the court's view, included "the general right to travel, the right of locomotion, the right to freedom of movement, and the

general right to associate with others." *Id.* at 18a (citations omitted).

In light of its conclusion that the gang loitering ordinance violates substantive due process, the court found it unnecessary to examine respondents' more specific claims under the First, Fourth, and Eighth Amendments. Pet. App. 5a, 19a.

SUMMARY OF ARGUMENT

A. The Supreme Court of Illinois clearly erred in concluding that Chicago's ordinance is an "arbitrary" restriction on "general right[s]" of "locomotion," "movement," "associat[ion] with others" and "travel" that are protected by "substantive due process." This Court's cases make clear that substantive due process is a residual doctrine, and that any analysis of such a substantive right must begin with careful identification of the constitutional sources of the protection being claimed. Indeed, a long line of cases exemplified by *Graham v. Connor*, 490 U.S. 386 (1989), holds that courts should *first* examine such claims under any applicable provisions of the Bill of Rights, and should not invoke "substantive due process" to circumvent the balance of societal and individual interests reflected in those Amendments. Because substantive due process is a *residual* doctrine, any recognition of substantive rights beyond those enumerated in the Bill of Rights carries a heavy burden of justification. Moreover, in order to maintain "the constitutional proportions" of due process (*County of Sacramento v. Lewis*, No. 96-1337, slip op. at 16 (U.S. May 26, 1998)), the standards applicable to any residual due process right that the Court *does* recognize must be tailored to mesh with related areas of constitutional law, and not subject legislators, courts, and police to inconsistent standards of conduct.

The decision of the Supreme Court of Illinois cannot be reconciled with those principles. That court got the analy-

sis exactly backwards by grounding its decision on "substantive due process" while at the same time declining to address respondents' claims under the First, Fourth, and Eighth Amendments. The correct analysis of those provisions of the Bill of Rights shows that respondents' conduct is unprotected by them. Respondents enjoy no First Amendment right to engage in non-expressive association, and any expressive conduct in which they might engage on public streets may permissibly be regulated, as the ordinance does, as to its time, place and manner. Because an order to disperse does not effect a "seizure," and the officer's conduct under the ordinance is in any event always justified by probable cause, respondents have no meritorious claim under the Fourth Amendment either. And respondents' contention that the ordinance creates a "status" offense forbidden by the Eighth Amendment is also foreclosed by this Court's cases. In view of that analysis, respondents cannot carry the heavy burden of demonstrating that any residual liberty interest in remaining on a public street "for no apparent purpose" is not similarly subject to reasonable state legislation under the police power.

B. The Supreme Court of Illinois also erred in its analysis of the ordinance's purported "vagueness." That court misperceived the proper role of vagueness doctrine, mistakenly using it as a source of authority for substantive review of the legislative policies reflected in the ordinance, rather than merely as a vehicle for ensuring clarity and fair notice of what is prohibited. The court also mistakenly believed that the breadth of a statute is grounds for its invalidation. Overbreadth is a distinct constitutional doctrine that is triggered only by a determination that a law reaches a *substantial* amount of expressive conduct protected by the First Amendment. Since the Chicago ordinance displays no infirmity under the First Amendment, much less reach a substantial amount of protected conduct, the Illinois court clearly erred in relying

on the purported breadth of the ordinance as a basis for its invalidation.

ARGUMENT

CHICAGO'S GANG LOITERING ORDINANCE IS CONSTITUTIONAL

Respondents' challenge to Chicago's gang loitering ordinance was predicated on its purported invalidity under the First, Fourth and Eighth Amendments, and on its alleged failure to supply the type of clear notice of the criminality of one's conduct that due process requires. The Supreme Court of Illinois refused to address respondents' claims under the Bill of Rights, concluding instead that the principles of "substantive due process" that inform the void-for-vagueness doctrine not only speak to the *clarity* of legislation, but also give courts broad authority to give *greater* relief to persons in respondents' position than the Bill of Rights would require in the circumstances.

The court's analysis resulted in the invalidation of an ordinance that addresses a compelling social problem with undoubted clarity, and which displays no constitutional infirmity under any conceivably applicable provision of the Bill of Rights. The basis for the court's holding was its conclusion that the right to loiter with members of criminal street gangs is an "amenit[y] of American life" protected by "substantive due process." Pet. App. 17a-18a. That surprising conclusion resulted directly from the court's failure to follow (or even acknowledge) the analytical framework that this Court has prescribed for "substantive due process" claims. That established framework requires courts to consider a defendant's claims under specific provisions of the Bill of Rights *first*, and permits invocation of substantive due process only residually—to safeguard the concededly few "fundamental" rights that are not already protected by the Bill of Rights. The "right" to loiter on public streets with members of a criminal street gang, notwithstanding a police order to move

along, is neither protected under the Bill of Rights nor so rooted in our Nation's traditions that it must be deemed "fundamental." The Supreme Court of Illinois accordingly erred by invoking the void-for-vagueness doctrine as the source of that "right."

A. Because "Substantive Due Process" Rights Are Inherently Residual, Courts Must Not Recognize Such Rights In Areas Already Addressed By The Bill Of Rights

This Court has repeatedly emphasized the limited substantive reach of the Due Process Clauses of the Fifth and Fourteenth Amendments. *Reno v. Flores*, 507 U.S. 292, 299-301 (1993); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality). Needless to say, the "right" to join a criminal gang, or the right to congregate on public streets with members of a criminal gang, bears no resemblance to "those recognized in this group of cases." *Ibid.* Respondents must therefore carry the burden of demonstrating that the asserted "rights" are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Flores*, 507 U.S. at 303 (internal citations omitted); *Medina v. California*, 505 U.S. 437, 445 (1992). Their burden in this respect is particularly high where, as here, they contend that due process immunizes an entire class of conduct from criminal liability, because this Court will not "lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Medina*, 505 U.S. at 445; *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986); *Montana v. Egelhoff*, 518 U.S. 37, 58 (1996) (Ginsburg, J., concurring in judgment). The Supreme Court of Illinois clearly erred in concluding that respondents met that heavy burden.

1. The Supreme Court of Illinois erred at the outset by avoiding respondents' claims under the Bill of Rights, and concentrating instead on substantive due process, with its "scarce and open-ended" guideposts "for responsible decisionmaking." *Collins*, 503 U.S. at 125; *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267-68 (1997). This Court's cases make clear that that mode of analysis put the cart before the proverbial horse. As the Court unanimously noted two Terms ago, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (same); *see also Soldal v. Cook County*, 506 U.S. 56, 70 (1992) (conduct challenged under more than one textual provision of the Constitution must be analyzed under each such provision separately); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993) (same, for Fourth Amendment and procedural due process).

This Court has applied that principle in a number of contexts. In *Graham*, the Court invoked it to hold that substantive due process has no place in analyzing claims that police used "excessive force" during an arrest, which must instead be gauged *solely* under the Fourth Amendment. As the Court put it, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." 490 U.S. at 395.

The Court reaffirmed that principle in *Albright*, *supra*, which rejected the notion that substantive due process embodies some right to be free from "arbitrary" prosecutions. As the Chief Justice explained, "[i]t was through

[the] provisions of the Bill of Rights that their Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations." 510 U.S. at 273 (plurality of Rehnquist, C.J., joined by O'Connor, Scalia & Ginsburg, JJ.). Thus, the Court concluded, only the specific Amendment that addresses the "particular sort of government behavior," rather than doctrines of substantive due process, should be applied to claims challenging that particular behavior. *Ibid.*; *see also id.* at 281 (Kennedy, J., joined by Thomas, J., concurring in judgment) ("I agree with the plurality that [the] allegation . . . must be analyzed under the Fourth Amendment without reference to more general considerations of due process"). As Justice Souter further noted, the importance of "reserving due process for otherwise homeless substantial claims" is "underscored by pragmatic concerns about subjecting governmental actors to two (potentially inconsistent) standards for the same conduct" and thereby imposing on the lower courts "the unenviable burden of reconciling well-established jurisprudence" under the Bill of Rights "with the ill-defined contours of some novel due process right." *Id.* at 287-88 (Souter, J., concurring in judgment).

The concern highlighted in Justice Souter's *Albright* concurrence—the need for any substantive due process right to mesh doctrinally with cognate provisions of the Bill of Rights—was evidenced in the Court's most recent opinion in this area. In *County of Sacramento v. Lewis*, No. 96-1337 (U.S. May 26, 1998), the Court was asked to decide whether a police officer violates substantive due process rights by recklessly causing a death during a high-speed automobile chase. In addressing that question, the Court first noted that "the rule in *Graham*" is a "threshold issue" that must be addressed before the Court can decide whether a particular allegation of government misconduct "can ever support a due process claim." *Lewis*, No. 96-1337 (slip op.), at 8. The Court then concluded that the particular chase was not "covered" by the Fourth

Amendment, because the plaintiff's freedom of movement was not terminated by an *intentional* use of force. *Id.* at 9; *compare Tennessee v. Garner*, 471 U.S. 1 (1985) (intentional use of deadly force effects a Fourth Amendment seizure). Accordingly, "*Graham*'s more-specific-provision rule" did not bar recognition of a substantive due process right in the circumstances. *Lewis*, No. 96-1337 (slip op.), at 10.

The potential availability of a due process claim did not, however, end the inquiry. As the Court recognized, "concern with preserving the constitutional proportions of substantive due process" required an "exact analysis" of the circumstances that could actually give rise to a violation of the due process right. *Lewis*, No. 96-1337 (slip op.), at 16. That "exact analysis" led the Court to its Eighth Amendment precedents dealing with prison riots as an "analogy * * * [that] would be hard to avoid" (*id.* at 18-19) when assessing the competing safety and law-enforcement considerations that must be balanced by a police officer in deciding whether to give chase. The Court therefore concluded that "[j]ust as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case." *Id.* at 19.

2. Given that respondents claimed in the courts below that the ordinance not only is "covered by," but in fact violates, the First, Fourth and Eighth Amendments, the Supreme Court of Illinois clearly erred in pretermitting those claims. That is a key error in two different respects. *First*, provisions of the Bill of Rights do indeed speak to the liberties that the court below believed are implicated by the ordinance, but it is quite clear that *nothing* in the Bill of Rights impugns the validity of that ordinance. The court's ruling therefore created "substantive due process" rights that are *broader* than the provisions of the Bill of Rights that speak to the particular questions, effectively circumventing the doctrinal limitations of those provisions.

Because the Bill of Rights speaks to—and does not invalidate—the bulk of the government conduct that the court below found objectionable, its "requirements are not to be supplemented through the device of 'substantive due process.'" *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

Second, the correct doctrinal analysis of the Bill of Rights questions is an essential threshold inquiry because, as *Lewis* demonstrates, the Bill of Rights necessarily informs the *scope* of any residual due process rights that the Court might recognize. That doctrinal analysis therefore avoids the creation of anomalies or inconsistencies in the constitutional rules that govern similar governmental judgments. *Compare United States v. Payner*, 447 U.S. 727, 736 (1980) (courts should not invoke supervisory power to supplement the exclusionary rule, which already reflects society's best judgment of the balance that should be struck between the government's and the suspect's interests). Here, the correct doctrinal analysis under the Bill of Rights not only fails to support respondents' specific challenges to the ordinance, but it also highlights the fact that interests quite a bit weightier than the right "to remain in one place for no apparent purpose," or the right to associate with criminal gangs, have uniformly been held subject to reasonable regulation under the police power. It therefore would be anomalous for any residual due process rights that might exist beyond those provisions of the Bill of Rights to receive the type of absolute protection that the Supreme Court of Illinois accorded them.

3. Chicago's ordinance is fully consistent with the First Amendment. This Court's "public forum" cases recognize that public streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.); *see also Cornelius v. NAACP*, 473

U.S. 788, 800 (1985). The First Amendment restricts, however, only the Government's ability to regulate "expressive" or "communicative" activity in those fora. *See Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The conduct of gang members in remaining in one place "for no apparent purpose" is neither expressive nor communicative. And even if it were, Chicago's ordinance would clearly be a valid "time, place and manner" regulation that is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Ibid.*; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-99 (1984) (sleeping in public parks, even if intended as expressive conduct to protest plight of the homeless, may be banned as valid "time, place and manner" regulation). Indeed, the interest that supports the ordinance—protecting the community from crime—is far more than "significant." As this Court has noted, it "cannot be doubted" that it is "legitimate and compelling." *Schall v. Martin*, 467 U.S. 253, 264 (1984); *see also DeVeau v. Braisted*, 363 U.S. 144, 155 (1960).[2]

Nor does the ordinance interfere with any associational rights protected by the First Amendment. "The ability and the opportunity to combine with others *to advance one's views* is a powerful practical means of ensuring the perpetuation" of First Amendment freedoms, but "[t]his is not to say * * * that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988) (emphasis added). Indeed, the Court has not held that there is a "right of private association for other than expressive or

[2] The ordinance is also supported by the "substantial governmental interest" in "attempting to preserve the quality of urban life," *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986), from the blighting influences and other untoward effects of gang loitering.

religious purposes." *Id.* at 20 (Scalia, J., concurring in judgment). Standing on a street corner with members of a criminal street gang "might be described as 'associational' in common parlance," but loitering "simply do[es] not involve the sort of expressive association that the First Amendment has been held to protect." *Dallas v. Stanglin*, 490 U.S. 19, 24 (1989). Rather, the activity proscribed by the ordinance is analogous to "walking down the street or meeting one's friends at a shopping mall"—which this Court has held outside the ambit of First Amendment protections. *Id.* at 25. Just as the Constitution does not recognize a "generalized right of 'social association' that includes chance encounters in dance halls" (*ibid.*), it does not create any right of "criminal association" that includes the right to remain on a street "with *no* apparent purpose" *other* than to associate with a "criminal street gang." [3]

3. The ordinance is also consistent with the Fourth Amendment. The police-citizen interactions contemplated by Chicago's ordinance—an officer's approach coupled with an order to disperse—do not give rise to a "seizure" of any person. A "seizure does not occur simply because a police officer approaches an individual" and engages him in conversation, *Florida v. Bostick*, 501 U.S. 429, 434 (1991), or because the officer chases a person away. *See California v. Hodari D.*, 499 U.S. 621, 627-29 (1991); *Brower v. County of Inyo*, 489 U.S. 593 (1989).

[3] Moreover, even if there existed a generalized First Amendment right to use public streets for non-expressive purposes, such a right would be shared equally by law-abiding members of the public who are *not* gang members. Nothing in the First Amendment would preclude the use of a State's police power to ensure that the intimidation and urban blight that attend loitering by gang members do not effectively oust the law-abiding public from enjoyment of the same First Amendment right. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776 (1994) ("The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights").

In any event, even if an officer's order to disperse could be considered a "seizure," Chicago police will issue such an order only "when there is *probable cause* to believe that criminal street gang members are loitering in a designated area." Pet. App. 72a (emphasis added). The existence of probable cause objectively justifies the minimal intrusion on individual liberty that the Chicago ordinance contemplates, and it accordingly constitutes the best guarantee of "evenhanded law enforcement." *Horton v. California*, 496 U.S. 128, 138 (1990); *compare Brown v. Texas*, 443 U.S. 47, 50-53 (1979) (invalidating "stop and identify" statute under the Fourth Amendment, because statute did not require officer to have probable cause or reasonable suspicion). That point was unanimously emphasized by the Court only two years ago, when it rejected the claim that the vehicular traffic laws are so broad and pervasive that they essentially license "the police to single out whomever they wish for a stop." *Whren v. United States*, 517 U.S. 806, 818 (1996). As the Court emphasized in *Whren*, the existence of probable cause is sufficient to justify interference with an individual's freedom of movement, since "the usual rule [is] that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact." *Ibid.*

4. Respondents' contentions under the Eighth Amendment are even more implausible. While that amendment does limit the ability of governments to criminalize a person's "status," *Robinson v. California*, 370 U.S. 660, 667 (1977) (noting that "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold"), Chicago's ordinance does not create a "status" offense (Pet. App. 5a) because it requires affirmative volitional *conduct*—loitering, membership in (or association with) a criminal street gang, and disobedience of a police order. *See Powell v. Texas*, 392 U.S. 514, 533 (1968).

* * * *

Because Chicago's ordinance does not violate any of the provisions of the Bill of Rights that safeguard the rights of citizens to remain on a public street without undue police interference—particularly the First and Fourth Amendments—"the more generalized notion of 'substantive due process'" (*Graham*, 490 U.S. at 395) should have little role in assessing the validity of that ordinance. That is particularly true in the absence of any demonstration that *additional* limitations upon governmental action are needed to protect *some* right that is deeply rooted in history and tradition. *See Albright*, 510 U.S. at 287-88 (Souter, J., concurring in judgment). If due process indeed creates "general right[s] to associate with others," to "locomote" or to "move[]" freely (Pet. App. 18a),[4] the preservation of "the constitutional proportions of substantive due process" (*Lewis, supra*, at 16) would require a persuasive basis for imposing greater restrictions on government with respect to those "general" rights than with respect to analogous, but more weighty, First and Fourth Amendment freedoms. The Supreme Court of Illinois did not provide that persuasive explanation.

B. Chicago's Ordinance Provides Fair Notice Of What Is Prohibited, And It Is Neither Vague Nor Overbroad

The only "firmly rooted" due process principle recognized by this Court that relates to respondents' claims here is the requirement of "fair warning" embodied in the void-for-vagueness doctrine. The Supreme Court of Illi-

[4] The Supreme Court of Illinois also adverted to "the general right to travel." Pet. App. 18a. While this Court has recognized a limited constitutional right to interstate travel, "or, more precisely, the right to free interstate migration," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986); *cf. Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990), it has never suggested that such a right encompasses the "right" to remain on a city street "with no apparent purpose" other than to congregate with criminal street gangs.

nois purported to find support for its conclusion in that doctrine. That court, however, confused vagueness with overbreadth, and it misapplied both doctrines. Neither doctrine supports the court's conclusion that Chicago's ordinance is constitutionally infirm.

1. The vagueness doctrine—like other due process doctrines—does not give the judiciary "a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." *United States v. Russell*, 411 U.S. 423, 435 (1973). As this Court repeatedly has made clear, the essence of vagueness review is simply the requirement of "fair warning," which centers on the use of "language that the common world will understand[] of what the law intends to do if a certain line is passed." *Lanier*, 117 S. Ct. at 1224 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Accordingly "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 117 S. Ct. at 1225; *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968) (statute that prohibits picketing that "obstructs or unreasonably interfere[s]" with courthouse entrances "clearly and precisely delineates its reach in words of common understanding"). Where, as here, a statute is attacked as vague on its face, the party challenging it bears the "heavy burden" of demonstrating that the law can *never* be applied in a valid manner. *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *New York State Club Ass'n*, 487 U.S. at 11; *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("the challenger must establish that no set of circumstances exists under which the Act could be valid").

The gang-loitering ordinance easily meets the applicable standards of clarity. It clearly defines membership in a "criminal street gang" by reference to a "pattern" of expressly identified state crimes. *Cf. Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 59 n.7 (1989) (noting that

state RICO statute's "pattern" requirement is "inherently *less* vague" than underlying crimes). The ordinance also clearly informs citizens of the prohibited conduct: "[R]emaining in one place with no apparent purpose" in the company of one or more members of a "[c]riminal street gang." Pet. App. 61a. Ordinary people are perfectly capable of understanding what the ordinance proscribes. Lest there be any doubt, however, an arrest can be made only after a police officer *informs* the loiterers that they must disperse. There can be no question but that a person in those circumstances "should understand that he could be convicted . . . if he fails to obey an order to move on." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972); *cf. Schenck v. Pro-Choice Network*, 117 S. Ct. 855, 869-70 (1997) (defendants, to whom injunction was specifically directed, "certainly" were given "a reasonable opportunity to know what was prohibited").

2. Relying on *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Illinois Supreme Court evidently concluded that the void-for-vagueness doctrine reaches beyond requiring clarity, and permits courts to examine statutes for substantive conformity with undefined substantive rights. This Court in that case struck as vague a Jacksonville vagrancy ordinance that made it criminal to be, among other things, a "rogue[]," "vagabond[]," "dissolute person[]," "habitual loafer[]," "common railer[] and brawler[]," or a "person wandering or strolling around from place to place without any lawful purpose or object." *Id.* at 156-57 n.1. As the Court noted, the ordinance's long list of undefined and antiquated criminal categories failed to "give fair notice of the offending conduct." *Id.* at 162; *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453-55 (1939) (voiding statute as vague because it made it criminal to be "known [as] a member of a gang" and "the phrase 'consisting of two or more persons' [was] all that purport[ed] to define 'gang' ").

Papachristou is itself far from a model of clarity, and it has led to widespread confusion in the lower courts.

See Livingston, 97 Colum. L. Rev. at 628. Nonetheless, especially when examined in light of this Court's modern approach to substantive due process, the two passages on which the Illinois Supreme Court relied cannot carry the weight that that court placed on them. The first passage referred to "amenities of life" that are "not mentioned in the Constitution or in the Bill of Rights" but that nonetheless may be elements of due process. 405 U.S. at 164; *see* Pet. App. 17a. That passage, however, is not a license for lower courts to discover those "amenities" on their own and in the teeth of the methodology prescribed by this Court in *Graham*, *Albright*, and *Lanier*; indeed, only the most expansive view of what "historically [has been] part of" those "amenities" (*Papachristou*, 405 U.S. at 164) could lead to the conclusion that loitering with criminal gangs is among them. In the second passage on which the court below relied, *Papachristou* emphasized that the activities outlawed by Jacksonville's ordinance "by modern standards are normally innocent." *Id.* at 163; Pet. App. 9a. As its context makes clear, however, nothing in that passage purported to confer on the lower courts unguided discretion to second-guess legislative judgments that specific conduct is *not* "innocent"—the Court's point was simply that an ordinance's lack of clarity is an especial source of concern when the ordinance is applied to conduct that a citizen would not otherwise recognize as culpable. *See Papachristou*, 405 U.S. at 162-63 (emphasizing need for "fair notice"). As already demonstrated, lack of *clarity* is not a failing that can fairly be ascribed to Chicago's ordinance.

3. The Illinois Supreme Court made clear that its real difficulty with the ordinance was not that it is *unclear*, but that it is too *broad*:

> The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally

> broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets.

Pet. App. 16a. The court evidently believed that this Court's decision in *Kolender*, on which it extensively relied, *see* Pet. App. 7a, 14a, 17a, warranted that type of "overbreadth" inquiry under the guise of the void-for-vagueness doctrine. That is incorrect.

Kolender invalidated a state statute that required persons who loiter or wander to produce "credible and reliable" identification and to account for their presence when requested to do so by a peace officer. 461 U.S. at 353. The problem with the statute was *not* that the words "credible and reliable," *objectively* considered, were incapable of defining what forms of identification were satisfactory. Rather, the difficulty was that, as construed by the state courts, the statute required that *the officer* be "satisfied that the identification [was] reliable." *Id.* at 360. Because of "the full discretion accorded to the police" (*ibid.*), the meaning of the statute necessarily changed with each officer's subjective judgment. And since the statute "necessarily entrust[ed] law making to the moment-to-moment judgment of the policeman on his beat" (*ibid.*), the Court concluded that the State had failed "to establish standards by which the officers may determine whether the suspect has complied with the * * * requirement." *Id.* at 361; *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (similarly invalidating statute with standards so subjective that "a violation may entirely depend upon whether or not a policeman is annoyed"); *compare Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (no vagueness problem where statute "set[] forth objective criteria for assessing whether items constitute drug paraphernalia").

Kolender emphasized the dual concerns of the vagueness doctrine—notice and the prevention of arbitrary enforcement—repeatedly, causing the court below to treat

those concerns as a two-prong "test." Pet. App. 7a, 14a. That reasoning appears to have led the Illinois court to conclude that any law that is broad enough to permit selectivity in investigation or prosecution encourages "arbitrary enforcement" and is therefore "vague." Neither *Kolender* nor any other opinion of this Court, however, stands for the proposition that clearly worded and objectively defined statutory language is *vague* simply because it gives police officers and prosecutors a *choice* in making charging decisions. To the contrary, the Court has consistently recognized that "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, or what charge to file or bring * * * generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Whren*, 517 U.S. at 818-19 (same for police officers); *see also United States v. Armstrong*, 517 U.S. 456 (1996). Indeed, the Court in *Whren* disclaimed even the *ability* to engage in the sort of open-ended review of the "breadth" of statutes that the court below undertook: "[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." 517 U.S. at 818.

4. Of course, there *is* a doctrine of "overbreadth" that is distinct from vagueness. Like vagueness, however, it is limited in reach.[5] This Court has made clear that a

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[5] The repeated citation by the court below of *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965), an overbreadth case, suggests that the court below did not see any significant distinction between the two doctrines. *See* Pet. App. 8a, 12a-13a. The ordinance at issue in *Shuttlesworth*, however, made it a crime "to stand *or* loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." 382 U.S. at 90. This Court's concern was primarily with the blanket prohibition on "standing" on a public street, which was permeated "with [an] ever-present potential for arbitrarily suppressing First Amendment liberties." *Id.* at 90-91. Indeed, the Court noted that the ordinance had been

legislative enactment can be declared unconstitutionally "overbroad" only if it "prohibits constitutionally protected conduct." *Grayned v. City of Rockford,* 408 U.S. 104, 114 (1972). The applicability of that doctrine therefore turns on the same questions under the Bill of Rights, particularly the First Amendment, that the Illinois Supreme Court expressly *declined* to reach. *See, e.g., Boos v. Barry,* 485 U.S. 312, 329 (1988) (in addressing overbreadth challenge, "a court's first task is to ascertain whether the enactment reaches a substantial amount of constitutionally protected conduct"). Indeed, this Court "ha[s] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States v. Salerno,* 481 U.S. at 745. Because the Chicago ordinance does not infringe on any First Amendment interests, its mere breadth cannot serve as a basis for facial invalidation. Indeed, even in cases where it applies, "[t]he overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.'" *New York State Club Ass'n,* 487 U.S. at 14 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973)). Here, respondents cannot show that the ordinance is *substantially* overbroad in that it threatens the valid "associational or expressive purposes" of a *substantial* number of those to whom it might be applied. *Id.* at 11, 14-15.

In any event, the Chicago Police have prepared detailed guidelines for the enforcement of the ordinance, which eliminate any question that the broad language of the ordinance itself might pose. Pet. App. 64a-73a. The court below rejected those guidelines on the ground that "[i]t is the duty of the lawmakers to establish minimal guidelines to govern law enforcement." Pet. App. 16a. But nothing in our Constitution governs the manner in which States, or local governments, allocate their legis-

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narrowed since the events in that case. Once the ordinance was narrowed to apply to loiterers who obstructed free passage and "refused to obey a request by an officer to move on," the Court could "not say that the ordinance is unconstitutional." *Id.* at 91.

lative functions. *Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 612-613 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Dreyer v. Illinois,* 187 U.S. 71, 83-84 (1902) (due process does not require separation of state powers). This Court frequently looks to administrative constructions in determining whether state statutes are constitutional. *See, e.g., Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or *enforcement agency* has proffered") (emphasis added); *see also Ward v. Rock Against Racism,* 491 U.S. 781, 795 (1989) ("Even if the language of the guideline were not sufficient on its face to withstand constitutional challenge, * * * the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement").

The Chicago police guidelines were adopted not only to narrow the breadth of the ordinance, but to avoid any possibility of arbitrary enforcement: "In order to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way, this directive [establishing the guidelines] establishes limitations on the enforcement discretion of Department members, and thereby provides for enforcement of the ordinance in a fair and principled way." Pet. App. 65a. Even a cursory review of the numerous and detailed discretion-guiding provisions of the police guidelines demonstrates that officers on the street have less discretion in enforcing the ordinance than they do, for example, in enforcing the traffic laws. *Cf. Whren,* 517 U.S. at 818-19. The Court must presume that the police officers who enforce the gang-loitering ordinance, and the prosecutors and courts who will thereafter review those officers' work, will do so fairly. *See, e.g., United States v. Mezzanatto,* 513 U.S. 196, 210

(1995); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

* * * *

The Supreme Court of Illinois expressly recognized that "[c]riminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." Pet. App. 17a. That assessment has been echoed by another state court of last resort, *see People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal.), *cert. denied*, 117 S. Ct. 2513 (1997), and doubtless represents a realistic appraisal of the compelling interests that the Chicago City Council sought to further with its gang-loitering ordinance. Yet, through an unwarranted expansion of "substantive due process" and "vagueness" doctrines, the Illinois court disabled the citizenry of that State from dealing effectively with that "cancer." Because the Supreme Court of Illinois clearly misread this Court's precedents, its judgment should be reversed.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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